STATE OF MICHIGAN

COURT OF APPEALS

JULIE LYNN AKERS, f/k/a JULIE LYNN REED, Plaintiff-Appellant,	UNPUBLISHED August 11, 2005
v	No. 261998 Oakland Circuit Court
ALPINE FOOD AND LIQUOR INC., d/b/a ALL STAR LIQUOR, Defendant-Appellee.	LC No. 04-058090-NO

Before: Borrello, P.J. and Bandstra and Kelly, JJ.

PER CURIUM.

Plaintiff appeals as of right an order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand for further proceedings. This case is being decided without oral argument pursuant to MCR 7.214(E).

A trial court's ruling on a motion for summary disposition is reviewed de novo on appeal. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(10) if the evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Id.*

To establish a negligence claim, a plaintiff must establish: (1) a duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury suffered by the plaintiff, and (4) causation of that injury by the defendant's breach. *Phillips v Diehm*, 213 Mich App 389, 397; 541 NW2d 566 (1995). Generally, a landowner has a legal duty to business invitees to exercise reasonable care to protect them from an unreasonable risk of harm caused by a dangerous condition of the land which the landowner knows or should know the invitees will not discover, realize or protect themselves against. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 609; 537 NW2d 185 (1995). However, under the open and obvious doctrine, a landowner has no duty to protect invitees from injuries on their land when the danger is known or obvious to the invitees, unless the landowner should anticipate the harm despite such knowledge or obviousness. *Id*. at 610. A defect falls under the open and obvious doctrine if it creates a risk of harm only because the invitee did not discover the condition or realize its danger, and the invitee should have discovered the condition and realized its danger. *Id*. at 611. Determination of whether a danger

is open and obvious depends on whether "an average user with ordinary intelligence [would] have been able to discover" the risk presented upon a casual inspection. *Corey v Davenport College of Business*, 251 Mich App 1, 5; 649 NW2d 392 (2002).

Here, the trial court erred in concluding that the wet cement was an open and obvious condition. While in the foyer area of defendant's store, plaintiff slipped in freshly poured cement. The freshly poured cement was apparently a different color and texture than the surrounding cement. Plaintiff testified in her deposition that she did not see the wet cement and did not know it was wet until she saw her feet covered with cement. Defendant argued before the trial court that because nothing prevented plaintiff from seeing the wet cement, the condition was open and obvious. However, even if there were differences in color and texture, it does not necessarily follow that an individual would be charged with the knowledge that a difference in color standing alone, equates with freshly poured cement. This is not a case in which plaintiff tripped on stairs or slipped on ice and snow. The newly poured cement was the dangerous condition, not the appearance of the cement itself. We can not conclude that an average user with ordinary intelligence would have been able to discover upon causal inspection, freshly poured cement, located inside defendant's foyer during business hours simply because of a difference in color and texture. Because the evidence is conflicting and reasonable minds could disagree on this issue, we hold that the trial court erred in finding that there were no genuine issues of material fact in regard to whether the wet concrete was "open and obvious."[1]

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

[1] Plaintiff has also presented a genuine question of whether defendant warned of the freshly poured cement. Robert Riley stated that other customers had no problems coming in and out of the store while the patchwork of wet cement was drying and that he verbally warned every customer who entered the store about the cement. He further stated that he put up a written warning on the doors. However, plaintiff denies seeing any warning signs and denies that she was verbally warned.